

**UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

**15-4408
Vet. App. No.**

HANS W. JACOBSON,

Appellant,

v.

ROBERT A. MCDONALD,

SECRETARY OF VETERANS AFFAIRS

Appellee.

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF REBUTTAL ARGUMENTS

Appellant Hans W. Jacobson (Jacobson) appeals the September 25, 2015 Board of Veterans' Appeals (Board) decision that denied service connection for cervical spine degenerative joint disease and migraines.¹ In his brief, Jacobson noted the Board's error in failing to ensure substantial compliance with a prior remand, ignoring favorable evidence, and providing inadequate reasons and bases for its decision.

In response to Jacobson's brief, the Secretary states the December 2014 examination report was reasonable for the Board to rely and the preponderance of the evidence was against the claims.²

In rebuttal, Jacobson noted the rationale for the examiner's opinion was premised, in part, on a denial of an in-service traumatic event, based on a lack of service medical records, despite the fact Jacobson was released early from active duty as a result of the in-service trauma. The denial of the migraine / headaches claim was predicated on the denial of the cervical spine claim. Because the examiner's opinion is based, in part, on an inaccurate factual premise the claims must be remanded.

¹ R 2 - 27 (September 25, 2015 Board Decision).

² Secretary's Brief (SB) at 10

II. REBUTTAL ARGUMENTS

A. **The Board Committed Remandable Error When, in Denying Jacobson's Claims for Service Connection for a Cervical Spine Disorder and Headaches / Migraines, it Relied upon an Examination Inadequate for Rating Purposes, Failed to Ensure Substantial Compliance with a Prior Remand, Ignored Favorable Evidence, and Provided Inadequate Reasons and Bases for its Decision.**

Jacobson seeks service connection for a cervical spine disorder claim on a direct basis and secondary to his service-connected lumbar spine disability. The Secretary concedes Jacobson suffers from a diagnosed degenerative cervical spine disorder.

In response to Jacobson's brief, the Secretary states Jacobson's only argument on appeal is that the Board erred in relying on the December 1, 2014, VA examination because he argues the examination relied on an inaccurate factual premise that he did not injure his back in service;³ however, while the examiner noted no service treatment records recorded hundreds of pounds of meat falling upon Jacobson, the examiner ultimately concluded the bone scan conducted 5-6 months after the incident would have revealed an injured cervical spine, if the scan had been abnormal.⁴ As such, the examiner's opinion is

³ SB at 11

⁴ SB at 11, citing R 2610 (2586-2621); 3323 (3316-3486); *Monzingo*, 26 Vet.App. at 106; *Martinak v. Nicholson*, 21 Vet.App. 447, 451 (2007)

grounded in the facts of record.⁵

The Secretary does concede it is favorably adjudicated his lower back was injured during active duty and it is not in dispute;⁶ however, the examiner reasonably found no connection between the low back injury and the cervical spine injury based on the facts of record.⁷

Finally, the Secretary submits Jacobson's only argument for service connection for headaches is secondary to service connection for the lumbar spine and, as such, the Board's denial must also be upheld.⁸

In rebuttal to the Secretary, Jacobson notes the Secretary has conceded, in 1988, it was adjudicated Jacobson was injured in-service when, during a heavy roll of the U.S.S. Leftwich (DD984), boxes of frozen meat pinned him to the deck.⁹ Jacobson was released early from his term of military service based on the incident.¹⁰ Nonetheless, when the examiner concluded, in the rationale for his opinion: "There is no record of having such a tremendously acutely traumatic

⁵ SB at 12, citing R. at 2610 (2586-2621); *Steffl*, 21 Vet.App. at 124; *Monzingo*, 26 Vet.App. at 106

⁶ SB at 12, citing R. at 3312; 3339-44 (Medical Board report for "low back pain"); 6417-18 (October 1988 RD)

⁷ SB at 12 - 14, citing R 2609 - 11 (2586 - 2621)

⁸ SB at 14, citing R 24-25, citing *Nolen*, 14 Vet.App. at 184

⁹ R 8; 6417 (6417 - 18) (October 1988 RD)

¹⁰ R 3339 - 44, 3479 - 83 (medical board records).

event such as 400, 500 or 1000# of frozen meat falling on him when he first sought care for his back pain in the 1986 time frame. It was only after x-rays Dec. 1986 showed pars defect, spondylolisthesis that such a hx came about.” The examiner’s rationale is contrary to a legally binding fact Jacobson experienced the in-service, traumatic event that could have reasonably led to a cervical spine injury, in addition to the conceded lumbar spine disorder.¹¹

Finally, the Secretary is correct in noting Jacobson claims he suffers from headaches / migraines as secondary to his cervical spine degenerative disease and / or service-connected lumbar spine degenerative disease. The Board has conceded Jacobson suffers from headaches / migraines.¹² Because the cervical spine claim must be remanded, his headaches / migraines claim must also be remanded.¹³

CONCLUSION

Accordingly, Jacobson requests this Court to reverse the Board’s decision, or in the more likely alternative, remand the claims for further adjudication with the facts of record and the controlling law.

¹¹ *Reonal v. Brown*, 5 Vet.App. 458, 461 (1993) (“[A]n opinion based upon an inaccurate factual premise has no probative value.”)

¹² R 3496 - 3501 (3491 - 3502) (July 2014 BVA remand).

¹³ *Bagwell v. Brown*, 9 Vet.App. 337, 339-40 (1996)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, to the best of my knowledge and ability, under penalty of perjury under the laws of the United States, that copy of the forgoing was served electronically to the party below:

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on August 18, 2016

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